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No. 77-1765

In the Supreme Court of the United States

OCTOBER TERM, 1978

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, PETITIONER

v.

GEORGE E. JONES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 573 F. 2d 167. The opinions of the Benefits Review Board (Pet. App. B1-B4 and C1-C9) are reported at 5 B.R.B.S. 7 and 5 B.R.B.S. 323. The decisions of the administrative law judge (Pet. App. D1-D6 and E1-E16) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1978. The petition for a writ of certiorari was filed on June 12, 1978 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Longshoremen's and Harbor Workers' Compensation Act provides compensation to all employees integrally involved in a shipbuilding operation.

STATEMENT

1. Petitioner operates a shipyard in Newport News, Virginia. The shipyard is engaged in every aspect of shipbuilding and ship repair work, and the assembly process takes place in several locations. Some parts or pieces are fashioned in land-based shops and subsequently refined and installed at shipways, where the vessels are assembled (Pet. App. D2, E4-E6).

Willie A. Graham was employed by petitioner as a "chipper" in its submarine shop. The submarine shop, which is one of several assembly shops in petitioner's shipyard, is used primarily for building or fabricating parts to be installed on submarines. Graham's duties were to remove temporary attachments from parts undergoing fabrication and to cleanse scars and welds so that the parts could be finished and then installed aboard vessels. Graham injured his back while working on a sonar shield that was later transported to petitioner's shipway and installed in the reactor room of a submarine (Pet. App. A3, D2).

George E. Jones had been employed by petitioner for 25 years prior to his injury on April 11, 1975. Throughout his employment, Jones had been a mechanic and had been assigned to various duties throughout the shipyard, including work aboard vessels (Pet. App. A3, E3-E4). On the day of his injury, he was assigned to petitioner's foundry shop, where his duties included oiling and lubricating machines used in constructing vessel components (Pet. App. A4). In addition to producing parts

for use in ship construction, the foundry also produces both ship-related and non-ship-related items (Pet. App. E5).

2. Following their injuries, Jones and Graham filed claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 86 Stat. 1251, 33 U.S.C. (1970 ed. and Supp. V) 901 *et seq.* The administrative law judges awarded recovery to both claimants (Pet. App. D1-D6, E1-E16), and the Benefits Review Board affirmed both awards (Pet. App. B1-B4, C1-C9). On petitioner's petition for review, the court of appeals affirmed (Pet. App. A1-A8). The court held that both Jones and Graham were engaged in shipbuilding, within the meaning of Section 2(3) of the Act, 33 U.S.C. (Supp. V) 902(3). Graham was a shipbuilder, the court held, because he was engaged in an integral part of the process of constructing a submarine (Pet. App. A4). Jones also met the statutory status requirement, the court held, because his maintenance work was essential to keeping the shipyard's machinery in working order for the construction of ships (Pet. App. A5-A6). Since both Graham and Jones were working in petitioner's shipyard, the court found that both were injured at a maritime "situs," and were thus covered by Section 3(a) of the Act, 33 U.S.C. (Supp. V) 903(a) (Pet. App. A3-A4).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with the decision of any other court of appeals.

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. (Supp. V) 902(3), provides that the Act covers "any person engaged in maritime employment, including any * * * shipbuilder * * *." The courts have uniformly held

that any person engaged in employment directed toward the production and assembly of a vessel and its component parts is a "shipbuilder" for the purposes of the Act. See *Jacksonville Shipyards, Inc.* v. *Perdue,* 539 F. 2d 533 (C.A. 5), certiorari denied *sub nom. Halter Marine Fabricators, Inc.* v. *Nulty,* 433 U.S. 908; *Dravo Corp.* v. *Maxin,* 545 F. 2d 374 (C.A. 3), certiorari denied, 433 U.S. 908; *Ingalls Shipbuilding Corp.* v. *Morgan,* 551 F. 2d 61 (C.A. 5), certiorari denied, 434 U.S. 966. Shipbuilding includes not only the production process but also the maintenance of the machinery used in the production process. *Alabama Dry Dock & Shipbuilding Co.* v. *Kininess,* 554 F. 2d 176 (C.A. 5), certiorari denied, 434 U.S. 903; see also *Bradshaw* v. *McCarthy,* 3 B.R.B.S. 195, petition for review denied, 547 F. 2d 1161 (C.A. 3).

Petitioner contends that Jones and Graham were not "shipbuilders" but were engaged instead in "routine support services * * * not directly related to the construction of ships" (Pet. 3).Yet Graham's work—removing attachments of component vessel parts during their fabrication—was an integral part of the shipbuilding process. His tasks were necessary steps in the process of constructing a part for installation in a submarine. Jones' work—maintaining machines used in the fabrication of vessel parts—also was essential to petitioner's shipbuilding operations. He serviced the machines that were directly involved in the construction of ships.

Petitioner further asserts (Pet. 7-11) that the decision in this case conflicts with decisions of the Third, Fifth, and Ninth Circuits. The decisions on which petitioner relies, however, apply the same legal principles that were applied by the court in this case and are distinguishable on their facts. In *Dravo Corp.* v. *Banks,* 567 F. 2d 593 (C.A. 3), the court of appeals held that an unskilled laborer injured while spreading salt on ice-covered walkways in the area

of a shipbuilding operation was not a "shipbuilder." As the court below noted, there is a substantial difference between Banks' unskilled general labor, which was not integrally related to the shipbuilding process, and Jones' work, which involved maintenance of the machinery directly used in the construction of ships.

The Fifth Circuit's decison concerning claimant Skipper in *Jacksonville Shipyards, Inc.* v. *Perdue, supra,* is even less apposite. Skipper, although ordinarily a shipbuilder, was injured while dismantling a metal shop some distance from any active shipbuilding location. The court held that Skipper's work, at the time he was injured, was non-maritime in nature and was being done at a non-maritime situs. As we have pointed out above, the decision in *Jacksonville Shipyards* concerning claimant Nulty strongly supports the decision here; Nulty's case and that of respondent Graham are almost identical.

Finally, *Weyerhaeuser Co.* v. *Gilmore,* 528 F. 2d 957 (C.A. 9), certiorari denied, 429 U.S. 868, on which petitioner relies, did not involve construction of the term "shipbuilder" at all. The claimant, a "pondman" at an Oregon sawmill, was injured when he fell from a floating walkway near the dock area of the sawmill. The court held that his work was not "maritime employment" within the meaning of the Act.

The decisions in *Gilmore, Banks,* and Skipper's case thus do not conflict with the decision of the court of appeals here. Although petitioner asserts (Pet. 11-13) that a recent decision of the Fifth Circuit conflicts with two decisions of the Benefits Review Board on the question of what constitutes "shipbuilding," resolution of any conflict that may arise among those decisions should await review of the Board's decisions in the courts of appeals. A simple

difference of opinion between an agency and a court in some other case is not a sufficient reason to grant review in this case, in which agency and court are in accord.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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